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No. 99-643

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WAREHAM EDUCATION ASSOCIATION,
BRIDGEWATER EDUCATION ASSOCIATION,
and FAIRHAVEN EDUCATORS' ASSOCIATION,
Petitioners,

v.

MASSACHUSETTS LABOR RELATIONS COMMISSION,
DAVID DUPUIS, ELEANOR DUPUIS, BETSY ANN WOOD,
CHARLES CIPOLLINI, and PETER ANTHONY,
Respondents.

On Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts

PETITIONERS' REPLY BRIEF

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ARGUMENT

Although respondent Massachusetts Labor Relations Commission has not filed a brief in opposition to the petition for certiorari, the individual respondents ("respondents") have done so. We offer the following observations in response to their Brief in Opposition ("Opp.").

I. THIS COURT SHOULD REVIEW THE DECISION BELOW IN ORDER TO CORRECT THE MISREADING OF *HUDSON* THAT RENDERS ILLUSORY THE RIGHT OF SMALL UNIONS TO COLLECT AGENCY FEES BY IMPOSING TRANSACTION COSTS FAR IN EXCESS OF THE AMOUNT OF THE FEES AT STAKE

A. Perhaps more so than in many other areas of the law, the jurisprudence of agency fee is replete with pro-

phylactic rules, designed to prevent violations of feepayers' First Amendment rights. As we explained in our Petition ("Pet."), this Court has repeatedly emphasized that, in crafting such rules, "the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 237 (1977); *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 302 (1986).

Respondents go to war with this fundamental notion that there are two interests at stake that must be taken into account in devising such prophylactic rules, insisting instead that their interests trump all others. In what could stand as the theme of their Brief in Opposition, respondents assert flatly that "TRANSACTION COSTS CANNOT DEFEAT FREE SPEECH RIGHTS," Opp. at 12—no matter how high those transaction costs, no matter how disproportionate they are to the amount of fees at stake, and no matter what methods other than audited financial statements may be available to provide nonmembers with adequate financial disclosure as to the agency fees they are asked to pay.

Respondents cite, for example, *Tashjian v. Republican Party*, 479 U.S. 208, 218 (1986), for the proposition that "cost considerations are not a sufficient basis to defeat First Amendment claims." Opp. at 13. But a willingness to take into account cost and burden in determining what prophylactic measures are necessary to protect a First Amendment right is not at all the same thing as "defeat-[ing]" that right. What was at issue in *Tashjian* was a statute that infringed a political party's First Amendment rights by prohibiting it from conducting open primary elections; the Court held that the additional expense to

the state of administering such primaries was "not a sufficient basis here for infringing appellees' First Amendment rights." 479 U.S. at 218.

At issue in this case, by contrast, is *not* a feepayer's First Amendment right to refuse to pay for union expenditures for non-bargaining-related activities to which he or she objects. Rather, the question is what kind of information petitioner unions must give respondents in order to enable them meaningfully to exercise that right. That is an important question, but it is not answered simply by observing that a First Amendment right is involved.

To the contrary, it in no way does violence to the First Amendment to suggest that a different prophylactic disclosure rule may be appropriate for very small unions than for larger ones. Indeed, the footnote from *Hudson* that is at issue here suggests as much, implicitly envisioning that the union's burden of providing financial disclosure to feepayers might be met in more than one way. The Court's observation that "[t]he Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures," 475 U.S. at 307 n.18, doubtless was—in view of the 26,000-member union that was before it in that case—based on the assumption that providing such an "exhaustive and detailed list" would be far more onerous than the option, which the Court sanctioned, of providing "the major categories of expenses, as well as verification by an independent auditor." *Id.* But where, for small unions like petitioners, the alternative of offering instead full access to the union's books—as was done here—is in fact far less burdensome, and provides sufficient information to the nonmember, *see* Pet. at 19, it follows from *Hudson*'s logic that such financial disclosure should satisfy the union's burden.

B. Respondents raise two factual issues related to the balance between the burden on the union of providing

additional information and the risk the feepayer may suffer from inadequate information. First, respondents take issue with our observation, *see* Pet. at 20, that it costs the feepayer nothing to challenge the amount of the agency fee, citing the expense of a recent proceeding before the Massachusetts Labor Relations Commission ("Commission") involving the agency fees of the Massachusetts Teachers Association ("MTA"). Opp. at 11 n.3. Respondents miss the point. The purpose of *Hudson*'s financial disclosure requirement is, as the court below observed, "to permit an agency fee payer to decide whether to oblige the union to prove before an independent fact finder that the agency fee charged was properly determined." App. 11a. The feepayer can do that by invoking the "rebate procedure" established by the union, under which an impartial decisionmaker appointed by the American Arbitration Association determines whether the union has met its burden of proving the chargeability of the fees it seeks. To invoke this procedure, which *Hudson* requires unions to provide, *see* 475 U.S. at 307-08, a nonmember feepayer need only send a letter to the treasurer of the local association that represents him or her; the burden is then on the union to prove in the arbitration proceeding its entitlement to its fees. "[M]ounting [such] a challenge" thus is, as the Seventh Circuit has observed, "for all practical intents and purposes free." *Gilpin v. AFSCME*, 875 F.2d 1310, 1316 (7th Cir.), *cert. denied*, 493 U.S. 917 (1989).

Second, respondents imply that petitioner unions can be put to the expense of obtaining full audits, without regard to the disproportionate cost, because of their affiliation with state and national unions that presumably can pay for such audits. Opp. at 11-12. What respondents evidently fail to understand is the contractual nature of the relationship between local unions and their state and

national affiliates, each of which is an autonomous legal entity. The affiliation relationship simply does not, as respondents would have it, afford the local union the right to draw at will on the state or national union's treasury.[1]

C. Respondents cite a "phalanx of federal circuit courts," Opp. at 9, and a "solid wall of adverse precedent," *id.* at 12, in support of the position taken by the court below. But the truth is that, of that "phalanx" of cases cited at pages 9-12 of the Brief in Opposition, only two—*Andrews v. Education Ass'n of Cheshire*, 928 F.2d 335 (2d Cir. 1987), and *Prescott v. County of El Dorado*, 177 F.3d 1102 (9th Cir. 1999)—even address the question presented here. And, as we explained in the Petition, those two cases point in opposite directions. *See* Pet. at 15-16.[2] Most of the rest of the "phalanx" simply contains boilerplate language citing this Court's *Hudson* opinion, while addressing issues unrelated to the local-audit question.[3]

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[1] The record indicates that, on a single occasion in 1989, MTA for exceptional reasons paid the cost for four of its larger locals to obtain audits.

[2] Respondents note that the court below "relied upon *Prescott* in ruling against [petitioners]," Opp. at 12—without attempting to respond to our explanation of how the court misread the *Prescott* opinion. *See* Pet. at 16 n.10.

[3] Several of these cases address and reject the argument that the auditor must verify not only the union's expenditures but also its allocation of those expenditures into chargeable and nonchargeable categories. *Dashiell v. Montgomery County*, 925 F.2d 750 (4th Cir. 1991); *Ping v. NEA*, 870 F.2d 1369 (7th Cir. 1989). One holds that *Hudson*'s audit requirement applies under the National Labor Relations Act. *Ferriso v. NLRB*, 125 F.3d 865 (D.C. Cir. 1997). In *Damiano v. Matish*, 830 F.2d 1363 (6th Cir. 1987), no audit issue was presented at all. The audit issues in *Tierney v. City of Toledo*, 917 F.2d 927 (6th Cir. 1990), concerned the independence of the auditor, and whether the auditor could be subpoenaed in subsequent litigation. And in *Knight v. Kenai Peinsula Borough School Dist.*,

D. Respondents' assertion that the decision below rests on independent state grounds is, quite simply, frivolous. Respondents appear blissfully unaware of this Court's cases dealing with "adequate and independent state grounds"; and, contrary to their assertion, Opp. at 15, the Petition does indeed address precisely the issues on which federal jurisdiction depends. *See* Pet. at 9-10. That review of the holdings of both the Commission and the Supreme Judicial Court makes plain beyond peradventure that the decision of the court below "fairly appears to rest primarily on federal law, or to be interwoven with the federal law." *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). Under these circumstances, this Court "accept[s] as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 1041. Indeed, the question here is not even a close one. The state court's holding rests on an analysis of the requirements of *Hudson*, and the only state precedents cited by the court are earlier cases in which it interpreted *Hudson*. *See* Pet. at 9 & n.7. *Cf. Ohio v. Robinette*, 519 U.S. 33, 37 (1996); *Pennsylvania v. Labron*, 518 U.S. 938, 941 (1996) (per curiam).

Without reference to any post-*Long* decision of this Court—and, indeed, without citing anything in the decision of the court from which certiorari is sought—respond-

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131 F.3d 807 (9th Cir. 1997), *cert. denied*, 524 U.S. 904 (1998), the issue was whether certain expenditures of the national union had been audited, and whether the union's *Hudson* notice adequately informed feepayers of that fact. The only two cited cases (other than *Andrews* and *Prescott*) that address local-union issues at all—*Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422 (6th Cir.), *cert. denied*, 498 U.S. 958 (1990), and *Hohe v. Casey*, 956 F.2d 399 (3d Cir. 1992)—both involved the "local presumption," which we discussed in the Petition. *See* Pet. at 15 n.9.

ents rely on litigation positions taken by the Commission in its briefing and argument before the Supreme Judicial Court. Opp. at 14-15. But even if these arguments about the "policies underlying the language of Section 12 of Chapter 150E," *id.* at 15, had been the basis for the Commission's decision—which they were not, *see* Pet. at 9—the arguments would be of no relevance both because they were in no way adopted by the Supreme Judicial Court in its opinion, and because, even if the court had cited such state policies, it would at most have led to a situation where the state court's decision was "interwoven with the federal law," rather than (as is in fact the case) "rest[ing] primarily [—indeed, entirely—] on federal law." *Long*, 463 U.S. at 1040.[4]

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[4] We confine one additional point to the margin. In their Statement of the Case and a portion of their Argument, respondents attempt to color the legal issue with a tendentious and irrelevant portrayal of an alleged crisis of embezzlement among local unions in general and MTA local affiliates in particular. *See* Opp. at 6-7, 10. Prominently featured is the statistic that, of unions that suffered embezzlement by their officers, 78 percent were local unions. *Id.* at 7. What respondents pointedly omit from their account is the percentage of *all* unions that are local unions. While the record does not supply that information, there can be little doubt that the percentage is actually substantially higher than 78%. For example, the National Education Association has 53 state affiliates and approximately 14,000 local affiliates. Local unions thus constitute approximately 14,000 of the combined total of 14,054 local, state, and national unions, or 99.6%. If anything, then, respondents' research establishes that, comparatively speaking, local unions are remarkably free from embezzlement activity.

Respondents' assertions with regard to MTA affiliates are equally misleading. Throughout this litigation, respondents have attempted to make a mountain of the fact that in 1990 and 1991 an MTA representative discovered and corrected two instances of financial improprieties on the part of local officers. One case involved a local treasurer's drawing stipends totaling $180 beyond the rate at which he should have been compensated; in the other, the local treasurer had allowed five checks from the school district to accumulate without depositing them. Both individuals, when confronted with their

II. THIS COURT SHOULD RESOLVE THE CONFLICT IN AUTHORITY CREATED BY THE DECISION BELOW CONCERNING THE APPROPRIATE REMEDY FOR A UNION'S FAILURE TO PROVIDE A CONSTITUTIONALLY ADEQUATE NOTICE OF THE BASIS FOR ITS AGENCY FEE

Respondents' argument with respect to the second question presented—the conflict between the remedial holding of the court below and the decisions of multiple federal circuits and state supreme courts on the appropriate remedy for a union's failure to provide adequate notice—appears to be largely a reprise of the "independent state grounds" issue just discussed. Respondents again rely, for their contention that the decision below "is beyond the purview of this Court," Opp. at 16, solely on arguments advanced by the Commission as a litigant in the court below, but not reflected in either the Commission's order or the court's opinion. *See id.* In point of fact, the opinion of the Supreme Judicial Court on this issue says nothing about the "discretionary statutory authority" of the Commission or the nature of the state "regulatory scheme." *Id.* at 15, 16. To the contrary, the court's holding on this point relies *exclusively* on federal precedents. *See* App. 12a-13a. There is, accordingly, no reason why this Court could not or should not review that holding and resolve the conflict in authority this issue presents.

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actions, promptly resigned their offices. These incidents are no more indicative of a crime wave among MTA local unions—and no more relevant to the legal question presented—than is the "78%" figure respondents brandish. Equally offensive is respondents' attempt, Opp. at 10, to equate with criminal malfeasance the unsurprising fact that small organizations run exclusively by volunteers often do not have recordkeeping and accounting practices that would meet the standards of a professional accountant.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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